Zurich Insurance (M) Bhd (formerly known as Malaysian Assurance Alliance Bhd) v AmTrustee Bhd & Anor (Meridian Asset Management Sdn Bhd, third party) and another suit

HIGH COURT (IPOH) — SUIT NOS D3–22–102 OF 2006 AND D3–22–1797 OF 2005
LEE SWEE SENG JC
8 JULY 2013

Trusts and Trustees — Breach of — Fiduciary duty — Investment monies placed with fund manager siphoned off — Whether fund manager could escape vicarious liability for fraudulent actions of employee — Whether custodian of funds appointed by fund manager liable to investor for breach of fiduciary duties and negligence — Whether relationship between custodian and investor gave rise to fiduciary duty and duty of care — Whether fund manager rather than custodian bore greater degree of liability for loss to investor

The plaintiff ('Zurich') had appointed the second defendant ('Meridian') as its external fund manager to invest its funds ('the funds'). Under a custodian services agreement ('CSA'), Meridian appointed the first defendant ('AmTrustee') as custodian of the funds and to invest the funds in the manner instructed by Meridian. Some years after placement of the funds, Zurich was informed by Meridian's management that one of Meridian's employees ('Ong') gave fraudulent instructions to AmTrustee to transfer several tens of millions of the funds to his personal trading account in a futures broking house, TA Futures. It was subsequently discovered that AmTrustee had not only transferred the funds to TA Futures but, as instructed by Ong, had also notified Meridian in its monthly reports that the funds were invested with another financial institution ('ASD') and that the investments were earning interest. Both those statements were false. Whilst criminal proceedings were taken against Ong, Zurich sued Meridian in the instant action for breach of trust and AmTrustee for breach of fiduciary duties and negligence. Zurich claimed damages against both parties and as against Meridian, sought the refund of the funds. Zurich's suit was heard together with another suit brought by Meridian against AmTrustee for contribution and indemnity not only with regard to Zurich's instant suit but also with regard to Meridian's liability to another investor, KWAP, which had obtained judgment against Meridian in a separate action. At the hearing, Meridian argued that it should not be held liable for Ong's actions as he had acted outside the scope of what he was employed to do. AmTrustee contended that it owed neither a fiduciary duty nor a duty of care

to Zurich as it acted solely on Meridian's instructions and was answerable only to Meridian with the regard to the manner in which the funds were dealt with.

Held, allowing claim with costs:

(1) An employer could not escape vicarious liability for the actions or inaction of its employee who did what was rightfully expected of him in the normal scope of his duties but did it in a negligent, wrongful or even fraudulent manner. Ong's action of giving instructions to AmTrustee on placement of funds fell within the ordinary and ostensible orbit of his represented authority. He was the face of Meridian with respect to the transactions both for MAA/Zurich and also KWAP. But he did a lawful act unlawfully. It was lawful for him to instruct AmTrustee but unlawful for him to have instructed them to record as otherwise than in the accounts of TA Futures where the monies actually went and had been taken out from (see paras 34–35).

(2) AmTrustee did not stand as a fiduciary to MAA/Zurich and did not owe it any fiduciary duties. To be a fiduciary of another, one must stand in a special relationship of trust and confidence that came with a duty to account to that other for the way the duties were exercised. MAA/Zurich had not placed 'trust and confidence' in AmTrustee and such a relationship was not one which had been accepted by AmTrustee. Even though AmTrustee was in actual possession of the funds it was a bare custodian of it and had to follow Meridian's instructions on how the funds were to be dealt with and was accountable only to Meridian. MAA/Zurich could not instruct AmTrustee nor call it up to find out the state of the accounts (see paras 40–43, 48–50).

(3) AmTrustee did not owe a duty of care to MAA/Zurich where its acting on Meridian's instructions and its reporting to Meridian were concerned. As to whether it was right and proper, or even negligent, for AmTrustee to have acted on the (fraudulent) instructions of Ong that was a matter governed by the CSA between Meridian and AmTrustee. MAA/Zurich gave complete discretion to Meridian to invest in whichever investments yielded optimum returns. Zurich's concern was not with what was stated in AmTrustee's reports to Meridian or with where the funds were invested in but with whether the investments yielded a return beyond the benchmark set (see paras 66, 69–71).

(4) Both Meridian and AmTrustee owed a duty of care to each other — Meridian in giving clear, unambiguous written instructions to AmTrustee and not to entice any staff of AmTrustee to fall for any egregious plans Ong or any other staff might have had. In turn, AmTrustee had to alert Meridian if there was any such attempt and indeed, as provided in the CSA, to even refuse to act on such instructions. It also had to record correctly its daily report to Meridian. Between the

parties Meridian had to take the greater blame, for without Ong the loss would not have happened. Therefore, Meridian was 60% liable and AmTrustee 40% liable (see paras 100–101).

[Bahasa Malaysia summary

Plaintif ('Zurich') telah melantik defendan kedua ('Meridian') sebagai pengurus dana luar untuk melabur dananya ('dana tersebut'). Di bawah perjanjian perkhidmatan pemegang ('PPP'), Meridian melantik defendan pertama ('AmTrustee') sebagai penjaga dana dan melabur dana-dana tersebut menurut cara yang diarahkan oleh Meridian. Beberapa tahun selepas penempatan dana, Zurich dimaklumkan oleh pengurusan Meridian bahawa salah seorang pekerja Meridian ('Ong') telah memberikan arahan palsu kepada AmTrustee untuk memindahkan beberapa puluhan juta dana tersebut ke dalam akaun dagangan peribadinya di sebuah pusat pembrokeran, TA Futures. Ia kemudiannya mendapati bahawa AmTrustee bukan sahaja memindahkan dana-dana tersebut kepada TA Futures tetapi, seperti yang diarahkan oleh Ong, juga telah memaklumkan Meridian dalam laporan bulanannya bahawa dana-dana tersebut telah dilaburkan dalam satu lagi institusi kewangan ('ASD') dan bahawa pelaburan tersebut menjana faedah. Kedua-dua pernyataan adalah palsu. Walaupun prosiding jenayah diambil terhadap Ong, Zurich menyaman Meridian dalam tindakan ini bagi pecah amanah dan AmTrustee bagi pelanggaran kewajipan fidusiari dan kecuaian. Zurich menuntut kerosakan terhadap kedua-dua pihak dan terhadap Meridian, meminta bayaran balik dana-dana tersebut. Guaman Zurich telah dibicarakan bersama-sama dengan guaman lain yang dibawa oleh Meridian terhadap AmTrustee bagi sumbangan dan tanggung rugi bukan sahaja dengan mengambil kira saman terhadap Zurich ini tetapi juga berkenaan dengan liabiliti Meridian kepada pelabur lain, KWAP, yang telah mendapatkan penghakiman terhadap Meridian dalam tindakan yang berasingan. Ketika perbicaraan, Meridian menghujahkan bahawa ia tidak akan bertanggungjawab atas tindakan Ong kerana dia telah bertindak di luar daripada skop yang telah dipertugaskan untuknya lakukan. AmTrustee menegaskan bahawa ia tidak mempunyai kewajipan fidusiari mahupun tanggungjawab berhati-hati ke atas Zurich kerana ia bertindak atas arahan Meridian dan hanya bertanggungan ke atas Meridian dengan mengambil kira cara dana-dana tersebut diuruskan.

Diputuskan, membenarkan tuntutan dengan kos:

(1) Seseorang majikan tidak dapat lari daripada liabiliti vikarius bagi tindakan yang diambil atau tidak diambil oleh pekerjanya yang melakukan apa yang berhak diharapkan daripadanya dalam skop biasa tugasnya tetapi dilakukan dengan cara cuai, salah atau penipuan. Tindakan Ong yang memberi arahan kepada AmTrustee mengenai penempatan dana-dana tersebut termasuk dalam ruang lingkup biasa dan kononnya dalam kuasa perwakilannya. Dia adalah wakil Meridian

berkenaan dengan transaksi kedua-dua MAA/Zurich dan juga KWAP. Tetapi dia juga melakukan perbuatan yang sah dengan cara yang haram. Ia adalah sah untuknya mengarahkan AmTrustee tetapi tidak sah untuknya mengarahkan mereka untuk merekodkan sebaliknya berbeza dengan apa yang ada dalam akaun TA Futures tentang ke mana wang tersebut sebenarnya mengalir dan telah dibawa keluar dari (lihat perenggan 34–35).

(2) AmTrustee tidak bertindak sebagai fidusiari kepada MAA/Zurich dan tidak menanggung apa-apa kewajipan fidusiari terhadapnya. Untuk menjadi fidusiari yang lain, seseorang mesti berada dalam hubungan khas yang terbentuk daripada kepercayaan dan keyakinan yang wujud dengan kewajipan untuk bertanggungan kepada yang lain untuk cara kewajipan dilaksanakan. MAA/Zurich tidak meletakkan kepercayaan dan keyakinan dalam AmTrustee dan perhubungan tersebut tidak merupakan suatu yang telah diterima oleh AmTrustee. Walaupun AmTrustee sebenarnya memiliki dana-dana tersebut, ia cumalah penjaganya dan perlu mengikut arahan Meridian tentang bagaimana dana-dana tersebut akan diuruskan dan dipertanggungjawabkan hanya kepada Meridian. MAA/Zurich tidak boleh mengarahkan mahupun menghubungi AmTrustee untuk mengetahui mengenai keadaan akaun (lihat perenggan 40–43, 48–50).

(3) AmTrustee tidak mempunyai kewajipan berhati-hati terhadap MAA/Zurich seperti mana tindakannya ke atas arahan dan laporannya kepada Meridian. Sama ada ia adalah betul dan wajar, atau cuai, untuk AmTrustee bertindak atas arahan (palsu) Ong merupakan perkara yang dikawal oleh PPP antara Meridian dan AmTrustee. MAA/Zurich memberikan budi bicara penuh untuk Meridian melabur dalam mana-mana pelaburan yang memberikan pulangan optimum. Kebimbangan Zurich bukanlah mengenai apa yang dinyatakan dalam laporan AmTrustee kepada Meridian atau mengenai di mana dana tersebut dilaburkan tetapi sama ada pelaburan membuahkan pulangan melangkaui jangkaan yang ditetapkan (lihat perenggan 66, 69–71).

(4) Kedua-dua Meridian dan AmTrustee mempunyai satu tugas berhati-hati terhadap satu sama lain — Meridian dalam memberi arahan bertulis yang jelas dan tidak samar-samar kepada AmTrustee dan untuk tidak menarik mana-mana kakitangan AmTrustee untuk jatuh ke dalam rancangan buruk Ong atau mana-mana kakitangan lain. Seterusnya, AmTrustee terpaksa memberi amaran kepada Meridian jika terdapat apa-apa percubaan sedemikian dan hakikatnya, sebagaimana yang diperuntukkan dalam PPP, enggan bertindak atas arahan tersebut. Ia juga perlu merekodkan dengan betul laporan hariannya kepada Meridian. Antara pihak-pihak, Meridian terpaksa memikul kebersalahan yang lebih

besar, kerana tanpa Ong kerugian tidak akan berlaku. Oleh itu, Meridian bertanggungan 60% dan AmTrustee bertanggungan sebanyak 40% (lihat perenggan 100–101).]

Cases referred to

ARL Associates Sdn Bhd & Ors v Bank Kerjasama Rakyat Malaysia Bhd [2012] MLJU 1450, CA (refd)

Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd and another et e contra [1983] 1 All ER 101, HL (refd)

Barings plc & Ors (No 5), Re, Secretary of State for Trade and Industry v Baker (No 5) [2000] 1 BCLC 523, CA (refd)

Caparo Industries Plc v Dickman and others [1990] 2 AC 605, HL (refd)

City Equitable Fire Insurance Company Ltd, In Re [1925] Ch 407, CA (refd)

Co-operative Central Bank Ltd, The v KGV & Associates Sdn Bhd [2008] 2 MLJ 233; [2008] 2 CLJ 545, FC (refd)

Donoghue (or McAlister) v Stevenson [1932] AC 562, HL (refd)

Dovey and The Metropolitan Bank (of England And Wales), Limited v John Cory [1901] AC 477, HL (refd)

Francis Joseph Putucheary v Eng Securities Sdn Bhd & Ors [2012] 7 MLJ 407, HC (refd)

Harwell v A-G of the British Virgin Islands [2004] 1 WLR 1273, PC (refd)

Hospital Products Ltd v United State Surgical Corp (1984) 156 CLR 41; 55 ALR 417 (refd)

Kumpulan Wang Persaraan (Inc) v Meridian Asset Management Sdn Bhd [2013] 9 MLJ 614, HC (folld)

Lister and others v Hesley Hall Ltd [2001] 2 All ER 769, HL (refd)

Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (refd)

Malayan Testing Laboratory Sdn Bhd v Standard Chartered Bank Malaysia Bhd [2010] 9 MLJ 94; [2010] 9 CLJ 309, HC (refd)

Mayban Trustee Berhad v CIMB Bank Berhad and other appeals [2012] 6 MLJ 354, CA (refd)

Maslinda bt Ishak v Mohd Tahir bin Osman & Ors [2009] 6 MLJ 826; [2009] 6 CLJ 653, CA (refd)

Mattis v Pollock (trading as Flamingos Nightclub) [2004] 4 All ER 85, CA (refd)

Meridian Global Funds Management Asia Ltd v Securities Commission [1995] AC 500, PC (refd)

Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd [2003] 1 HKC 225 (refd)

Legislation referred to

Anti-Money Laundering and Anti-Terrorism Financing Act 2001
Securities Industry Act 1983 ss 47C(1), (9)

Puteri Shehnaz Majid (Aimee Lee with her) (Cheah Teh & Su) for the plaintiff.

Lim Kian Leong (Tan Wei Wei with him) (Lim Kian Leong & Co) for the first defendant.

Loh Siew Cheang (Kelvin Seet Wan Nam and Choo Jun Lin with him) (Cheang Ariff) for the second defendant.

Lee Swee Seng JC:

[1] The plaintiff, Zurich Insurance (M) Bhd ('Zurich') went through a most harrowing and horrifying experience. It was both shocked and stunned to find that some RM19.6m of public funds entrusted with the fund manager, Meridian Asset Management Sdn Bhd ('Meridian'), had gone missing. Meridian in turn passed the buck to AmTrustee Bhd ('AmTrustee') its custodian banker for having acted on unauthorised instructions from a fraudster in Meridian who had been accustomed to giving instructions to AmTrustee with respect to the placement of funds. The fraudster had instructed AmTrustee via some 28 transactions to place various sums of monies with TA Futures Bhd ('TA Futures') and to reflect these placements as placements with Amanah Short Deposits ('ASD').

[2] Daily reports were given by AmTrustee to Meridian to reflect that for somehow the staff at AmTrustee was convinced after clearing with her superior that the explanation of the fraudster that TA Futures were related to ASD was a justifiable explanation for such a treatment. Though monies did not go into ASD, it was so reflected including the element of interest earned from such a placement in ASD. The monies that actually went to TA Futures for the account of the fraudster were withdrawn by the fraudster by himself or through his nominees or agents.

PARTIES AND PERSONALITIES

[3] Zurich had to come to terms with its loss. After picking up the pieces and putting them together, it had to decide who to sue. Initially it sued just AmTrustee as the first defendant ('D1') for breach of fiduciary duties and for negligence. Apparently that was because it was formerly related to Meridian. In fact its previous name was Malaysian Assurance Alliance Bhd ('MAA'). However in 2012, before the trial commenced, there was a corporate restructuring where the insurance business was hived off to and bought over by the Zurich Insurance Group such that the company in line with its core business being insurance is now called Zurich. With no more related shareholding to Meridian, it then joined Meridian as the second defendant ('D2') in Suit D3–22–102 of 2006 ('Zurich Suit') and its cause of action is for fraudulent breach of trust. In this judgment reference to the plaintiff shall be by way of reference to Zurich or to MAA as the context may require.

[4] AmTrustee is a subsidiary of AMMBB Holdings Bhd and is part of the AmBank group of companies in Malaysia. It was appointed by Meridian to act as custodian to perform the custodial and administrative functions on behalf of Meridian. Meridian is in the business of asset or fund management and MAA and Kumpulan Wang Pesaraan (Diperbadankan) ('KWAP') are amongst its clients.

[5] Mr Nicholas Ng Tiong Yee is the Managing Director of Meridian and overall the man at the helm of Meridian. He was the main witness for Meridian. Mr Ong Keng Hoe ('Ong') was the employee of Meridian incharged of MAA's funds and KWAP's funds and the person accustomed to liaising with AmTrustee with respect to instructions for the placements of funds. He had been convicted for criminal breach of trust by the sessions court and whilst AmTrustee tried to call him as a witness, the subpoena on him could not be served as he could not be located.

[6] The Zurich Suit captures fully the claims of the parties against one another for in it AmTrustee as D1 had earlier brought in Meridian as a third party and now that Meridian had been joined as D2, D2 also had filed a counterclaim against D1 in which the cause of action is the same as in the D3–22–1797 of 2005 suit ('Meridian suit') where Meridian is the plaintiff and AmTrustee is the defendant. Both the Zurich suit and the Meridian suit were heard together by consent of the parties.

PROBLEMS

[7] MAA had appointed Meridian vide a letter of appointment ('LOA') dated 9 October 1998 as its external fund manager for the purpose of investing insurance funds. A total of RM145,000,000 was placed with Meridian between 1998 and 2002. Meridian appointed AmTrustee as custodian under a custodian services agreement ('CSA') dated 13 October 1998. As a custodian AmTrustee was to perform custodial and administrative functions in respect of MAA's funds placed for investment.

[8] It transpired that between 20 June 2002 and 30 December 2004, Ong of Meridian had fraudulently transferred a total of RM33,248,000 belonging to MAA to his personal trading accounts in TA Futures, a futures broking house. AmTrustee acted as the custodian of the funds and complied with Ong's instruction on the said transfers to TA Futures. Physically the monies were deposited with AmBank.

[9] Ong had been charged and convicted on 12 December 2011 in the sessions court for cheating. He had been sentenced to five years imprisonment and had obtained a stay of the sentence pending appeal. His wife and his sister

together with him had also been charged for various offences under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001. He had employed a bold and brazen modus operandi to pull off his scam. He issued forged written instructions to AmTrustee for the transfer of MAA's monies to his personal trading account in TA Futures on 28 separate occasions. He must have pulled the wool over the eyes of the staff handling the transactions as they complied with his instruction to so transfer the funds but had it recorded in its portfolio valuation report to Meridian as cash placements with ASD, a financial institution. Thus the monthly reports generated by AmTrustee were false as the monies had left the custodian to TA Futures and yet were captured and recorded as having been placed with ASD. In other words the transactions recorded as cash placements with ASD were non-existent, dummy cash placements!

[10] The fraud was discovered only in August 2005. MAA was so informed by the managing director of Meridian, one Mr Nicholas Ng, who was the main witness for Meridian at the trial. A list of all the 28 transactions involving MAA's monies including references to the common bundle of documents ('CBOD') was annexed as Annexure B to the main submission of Zurich.

[11] There is a pattern and paper trail for each transaction that cannot be disputed though the legality of whether it was binding on Meridian and AmTrustee is now being disputed by both of them. It is strikingly simple and startlingly strange enough for the staff of AmTrustee to have fallen for it. It consisted of the following:

(a) there was a written instruction from Meridian to AmTrustee forged by Ong of Nicholas' signature by way of 'cutting and pasting' it onto Meridian's letterhead and this was then faxed over to AmTrustee for the transfer of monies to TA Futures;

(b) there was the inter-bank instruction from AmTrustee to AmBank to effect the transfers to TA Futures; and

(c) there was the false and dummy instruction from Meridian through Ong to AmTrustee for the non-existent cash placements with ASD.

[12] The losses must be recovered for Zurich owes a duty to its shareholders. Though it sued Meridian quite late in the day, it couched its claim on what it considers to be a fraudulent breach of trust. However its claim against AmTrustee for breach of fiduciary duties and negligence is more difficult to unravel and the issues involved shall be discussed in this judgment.

[13] Meanwhile as between Meridian and AmTrustee, Meridian is saying that AmTrustee should not have acted on what it should have known as fraudulent and that the so-called instructions are no instruction at all within

the terms of the CSA and its extension. AmTrustee maintained that it had no reason to disbelieve Ong who was the face of Meridian in all its dealings with Meridian and that Meridian should have checked the daily and monthly reports it sent to Meridian and reverted to AmTrustee if there was anything amiss. As it turned out the reports sent were intercepted and concealed by Ong.

[14] There were 30 transactions involved (28 with respect to MAA and two with respect to KWAP) amounting to a total of RM41,248,000. Ong had returned certain sums to the custodial account of MAA and KWAP'S leaving the balance of RM27,606,169.65.

[15] How true it is that our hair might all be black but who can discern the thoughts and intention of the hearts. All it takes to wreak havoc is for one man to unsuspectingly scheme beneath the calm serenity of a seamless system that was supposed to stand secure in safeguarding the millions in public funds from being siphoned off by unscrupulous fund managers.

PRAYERS

[16] In the Zurich Suit the plaintiff Zurich had claimed against AmTrustee as D1 for breach of fiduciary duties as well as for negligence. Zurich further claimed against Meridian as D2 for breach of trust.

[17] As for the Meridian Suit, it is only confined to the claim by Meridian as plaintiff against AmTrustee as the defendant. It has to do with Meridian's claim for a contribution and indemnity from AmTrustee for the claim by Zurich here and by KWAP in a judgment that KWAP had taken against Meridian after a full trial. The two suits were heard together by consent because the underlying factual matrix is the same and straddles both suits. In fact all the parties agree that the decision of the court in the Zurich Suit would bind Meridian and AmTrustee in the Meridian Suit. It would not be incorrect to say that the Meridian Suit is an extended mirror image of the actions between AmTrustee and Meridian inter se between themselves as defendants and as a defendant (AmTrustee) against a third party (Meridian). To a large extent there is prolixity of pleadings which tends to prolong trials but thankfully learned counsel on all sides could be persuaded to just focus on the dispute in the Zurich Suit involving all three parties in Zurich, AmTrustee and Meridian which decision would also resolve correspondingly the Meridian Suit which only concerns Meridian and AmTrustee.

PRINCIPLES

The claim by Zurich against AmTrustee and Meridian in the Zurich suit (D3–22–102 of 2006)

[18] The court will deal first with the claim by Zurich against AmTrustee

and Meridian.

The claim by Zurich against Meridian for breach of trust

[19] Zurich's claim against Meridian is for fraudulent breach of trust. It cannot be denied that Ong, the one who perpetrated the fraudulent transactions was a staff of Meridian assigned to deal with the giving of instructions to AmTrustee. This claim can be decided squarely and simply under the concept of vicarious liability.

[20] Under the principle of vicarious liability, Meridian is responsible for the actions of Ong. It cannot be otherwise as here the evidence of PW1, Mr Chen Kim Loong, the Vice President of Zurich, is that it trusted Meridian with respect to its discretion in deciding where to invest and when and how much. Meridian may say that the agreement which they had with AmTrustee was not complied with by Ong in the giving of part oral instructions and so Meridian is not responsible for Ong's action. But that defence is not open to Meridian in a suit for breach of trust of the monies entrusted to Meridian by Zurich for the purpose of investing it and accounting for it.

[21] Zurich has no control over who Meridian engages to do the investments and placements of funds or the standard operating procedure that has not been complied with by either a staff of Meridian or together with staff of AmTrustee. That is none of Zurich's concern.

[22] I am in agreement with a similar decision based on the same factual matrix in *Kumpulan Wang Persaraan (Inc) v Meridian Asset Management Sdn Bhd* [2013] 9 MLJ 614 (KWAP's case) a decision of my learned brother Justice Hamid Sultan where His Lordship succinctly set out his grounds for holding Meridian liable under the concept of vicarious liability as follows:

> [8]… I take the view that the plaintiff's claim must be allowed. My reasons, inter alia, are as follows:
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> (a) The defendant's argument that they are not liable for the conduct of their employees for any criminal act or fraud of the said employee beyond the control and authority of the defendant will not apply in the instant case. In addition, if there was proper check and balance, the incident could have been avoided.
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> (b) The plaintiff's argument that on the factual matrix of the instant case the defendant is liable on the principle of vicarious liability has merit. Support for the proposition can be found in a number of cases. In *Dubai Aluminium Co Ltd v Salaam and others* Lord Millet had this to say:

> [it is] no answer to a claim against the employer to say that the employee was guilty of intentional wrong doing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty … vicarious liability is not necessarily defeated if the employee acted for his own benefit …
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> The vicarious liability of an employer does not depend upon the employee's authority to do the particular act which constitutes the wrong …

(c) In addition I must say professional fund manager, such as the defendant, has a greater duty and responsibility and cannot easily hide behind the criminal acts of the employee when it involves direct or indirectly the funds of clients. In *Barlett and others v Barclays Bank Trust Co Ltd* Birghtman J had this to say:

> I am of opinion that a higher duty of care is plainly due from someone like a trust corporation which carries on a specialised business of trust management … and in any event I would take judicial notice of that fact. Having expressed my view of the higher duty required from a trust corporation, I should add that the bank's counsel did not dispute the proposition.

[23] It is true that the cause of action in KWAP's case is that of breach of the investment management agreement and breach of trust whereas here it is only for breach of trust. The reason why the Zurich could not found its cause of action for breach of contract was that limitation had already set in by the time the amendment was made to add the Meridian as D2 whereas for a breach of trust, there is no fear of limitation setting in. However that difference aside, the concept of vicarious cuts through both causes of action.

[24] Learned counsel for Meridian, Mr Loh Siew Cheang, referred to the House of Lords case of *Lister and others v Hesley Hall Ltd* [2001] 2 All ER 769 where the current test of vicarious liability is that it is not sufficient to merely ask whether the impugned act was carried out in the course of employment. One must also ask whether the act has a close connection to what the employee was employed to do. To appreciate the context of that proposition one must consider the context of the peculiar case before the House of Lords. The claim by the appellants were for damages for personal injury suffered whilst they were sexually abused in a boarding school for boys run by the respondent. The acts have been committed by one of the employees of the respondent. The appellants contended that the respondent was vicariously liable for the torts committed by their employee G. The House of Lords after reviewing the case law, allowed the appeal and held that having regard to the circumstances of the

warden's employment, including the close contact with the pupils and the inherent risks that it involved, there was a sufficient connection between the work that he had been employed to do and the acts of abuse that he had committed for those acts to be regarded as having been committed within the scope of his employment and the defendants should be held vicariously liable for them.

[25] Lord Steyn clarified the position as follows at pp 775–776:

> 17 It is easy to accept the idea that where an employee acts for the benefit of his employer, or intends to do so, that is strong evidence that he was acting in the course of his employment. But until the decision of the House of Lords in *Lloyd v Grace, Smith & Co* [1912] AC 716 it was thought that vicarious liability could only be established if such requirements were satisfied. This was an overly restrictive view and hardly in tune with the needs of society. In *Lloyd v Grace, Smith & Co* it was laid to rest by the House of Lords. A firm of solicitors were held liable for the dishonesty of their managing clerk who persuaded a client to transfer property to him and then disposed of it for his own advantage. The decisive factor was that the client had been invited by the firm to deal with their managing clerk. This decision was a breakthrough: it *finally established that vicarious liability is not necessarily defeated if the employee acted for his own benefit.* On the other hand, an intense focus on the connection between the nature of the employment and the tort of the employee became necessary.

[26] His Lordship then considered the classic case of vicarious liability for intentional wrongdoing as follows:

> 19 The classic example of vicarious liability for intentional wrong doing is *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716. A woman wanted her mink stole cleaned. With her permission it was delivered to the defendants for cleaning. An employee took charge of the fur and stole it. At first instance the judge held that the defendants were not liable because the theft was not committed in the course of employment. The Court of Appeal reversed the judge's decision and held the defendants liable. It is possible to read the case narrowly simply as a bailment case, the wrong being failure to redeliver. But two of the judgments are authority for the proposition that the employee converted the fur in the course of his employment. Diplock LJ observed, at pp 736–737:
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> > If the principle laid down in *Lloyd v Grace, Smith & Co* [1912] AC 716 is applied to the facts of the present case, the defendants cannot in my view escape liability for the conversion of the plaintiff's fur by their servant Morrissey. They accepted the fur as bailees for reward in order to clean it. They put Morrissey as their agent in their place to clean the fur and to take charge of it while doing so. The manner in which he conducted himself in doing that work was to convert it. *What he was doing, albeit dishonestly, he was doing in the scope or course of his employment in the technical sense of that infelicitous but time-honoured phrase. The defendants as his masters are responsible for his tortious act.* (Emphasis added.)

[27] His Lordship concluded at p 777 as follows:

> 20 *Our law no longer struggles with the concept of vicarious liability for intentional wrongdoing.* Thus the decision of the House of Lords in *Racz v Home Office* [1994] 2 AC 45 is authority for the proposition that the Home Office may be vicariously liable for acts of police officers which amounted to misfeasance in public office — and hence for liability in tort involving bad faith …. (Emphasis added.)

[28] Our very own Court of Appeal has applied this test in *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653. In *Maslinda Ishak* case, Maslinda sued the Director General of Angkatan Relawan Rakyat Malaysia ('RELA'), the Director of Jabatan Agama Islam Wilayah Persekutuan ('JAWI') and the Government of Malaysia for acts done by a RELA officer. The brief facts were that the RELA officer arrested Maslinda and place her inside a truck. Maslinda had to ease herself. The facts as reported in the judgment were as follows:

> Enroute (Maslinda) had requested from officers of (RELA) and (JAWI) permission to use the toilet facilities but was disallowed. Instead, she was scolded and told to urinate in the truck. As she was in quite a state, she asked her friends to shield her by encircling her with a shawl, in order to ease herself. At that particular moment, the (RELA officer) opened the door of the truck, rushed in, pulled down the shawl and proceeded to take numerous photos of the appellant in a squatting position urinating.

[29] The Court of Appeal held that RELA, JAWI and the Government of Malaysia were jointly and severally liable in vicarious liability for the acts of the RELA officer. Here the RELA officer not only had the opportunity to do what he did in the course of his employment but he also had Maslinda his custody, including care and control.

[30] Learned counsel for Meridian submitted that the line of reasoning in *Lister and Other* and *Maslinda Ishak* can be clearly seen in the case of attorney general of the *Harwell v A-G of the British Virgin Islands* [2004] 1 WLR 1273. This case concerned a policeman. He had care, custody and control of a strongbox which contained a gun and ammunition in that he was entrusted with the key to the strongbox. He took the gun and went off to other islands over which he had no jurisdiction. He shot two people. The question was whether the policeman went on a frolic of his own or what he did was closely connected with his employment. The Privy Council held that his employer was vicariously liable — the gun was in his custody as an employee and it was entrusted to him.

[31] Meridian also referred the court's attention to *Mattis v Pollock (trading as*

Flamingos Nightclub) [2004] 4 All ER 85 and its learned counsel had summarised the facts and findings of the court as follows:

> Mr Pollock employed Mr Cranston as a doorman at his nightclub. Prior to the incident in which the appellant was rendered a paraplegic, the evidence showed that Mr Cranston was tacitly encouraged by Mr Pollock to intimidate customers and use physical violence to remove customers from the nightclub. In the earlier incidences, Mr Pollock had 'connived at Cranston's display of violence' … and when acting on instructions of Mr Pollock, (Mr Pollock made it clear that (Cranston) would be violent in order to carry out … instructions, if necessary'. Two employees had warned Mr Pollock that Cranston was dangerous and the other had warned that Cranston was a bully. Mr Pollock thought otherwise — Cranston's reputation was an attribute.
>
> On 31 July Mr Cranston assaulted a customer on the basis that he was not allowed in the club and in episode that followed, Mr Cranston was struck several times. He left the nightclub and returned with a knife, intend on revenge on the injuries inflicted on him. He stabbed Mr Mattis in the neck. The issue was whether the events, which culminated in the stabbing of Mr Mattis should be treated as a single or isolated incident, which had begun in the club while Cranston was working as a doorman, or whether the initial incident came to an end when Mr Cranston left the club.
>
> The Court of Appeal held that in the course of employment, Mr Pollock had encourage and expected Mr Cranston to be perform his duties in an aggressive and intimidating manner, which included the physical manhandling of customers. The ratio appears at p 96:
>
> > The incident certainly developed in stages, at each of which it might have petered out. However, in our judgment, judge Seymour approached the question for decision too narrowly. The stabbing of Mr Mattis represented the unfortunate, and virtual culmination of the unpleasant incident which had started within the club, and could not fairly and justly be treated in isolation from earlier events, or as a separate and distinct incident …
> >
> > Mr Pollock chose to employ Cranston, knowing and approving of his aggressive tendencies, which he encouraged rather than curbed, and the assault on Mr Mattis represented the culmination of an incident which began in Mr Pollock's premises and involved his customers, in which his employee behaved in the violent and aggressive manner which Mr Pollock expected of him.

[32] Meridian also referred to *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* [2003] 1 HKC 225. There a doorman employed by the hotel seriously injured two pedestrians when he lost control of the limousine he was driving along Queensway. The car was hired by the hotel and, if the regular chauffeur was absent, the doorman was sometimes required to move it, which might involve driving along Queensway. Separately, other members of staff used to go out to buy food and, occasionally, would persuade the chauffeur to give them a lift. On the night of the accident, a bellboy was going out to pick up food for

his colleagues and, as the chauffeur was off duty, he persuaded the doorman to take him in the limousine, and the accident occurred on the way.

[33] The Court of Final Appeal held that hotel had impliedly authorised the doorman to have care, control and custody of the limousine in the course of his employment in that he had legitimate access to keys of the limousine and was allowed to move and drive the vehicle whenever necessary. It was during the course of his care, control and custody of the limousine that the accident occurred. There was a risk that the act of the doorman moving and driving the limousine, which was part of the job of the doorman, would cause damage to others.

[34] All these cases seek to highlight that an employer who had an employee who does what is rightfully expected of him in the normal scope of his duties but does it in a negligent, wrongful or even fraudulent manner, that employer cannot escape being vicariously liable for the actions or inaction of its employee.

[35] There is no doubt that Ong's action of giving instructions to AmTrustee fell within his ordinary and ostensible orbit of his represented authority where placement of the funds for investments are concerned. Indeed he is the face of Meridian with respect to these transactions both for MAA and also KWAP. What happened was that he had done a lawful act unlawfully. It was lawful for him to give instructions in writing to AmTrustee but it was unlawful for him to have instructed them to record as otherwise than in the accounts of TA Futures where the monies had gone and had been taken out. Meridian's distinction that the funds were not entrusted to Meridian but to AmTrustee and thus Meridian cannot be held liable is an artificial distinction devoid from reality. The reality of the matter was that the funds would still have been with AmTrustee as custodian if not for Ong enticing and entrapping the staff of AmTrustee to do his bidding. While there may be some merit in the reverse argument that the funds would stil be there if not for AmTrustee acting on Ong's instruction when AmTrustee should not have so acted, that would only be relevant when considering the respective claims of Meridian and AmTrustee against each other. The action of Ong representing Meridian was a necessary link that had caused loss of the funds of Zurich. Where trust was expected and necessary, it was woefully missing. There is no way under such a factual matrix for Meridian to wriggle its way out of liability where Zurich's claim is concerned under a breach of trust. It would be a most alarming and anxious scenario if monies entrusted with a fund manager can vanish and all the fund manager needs to say is 'Sorry not my fault because it was a staff of mine that acted fraudulently but don't look to me for he could not have pulled it through without the

custodian agreeing to release the funds as fraudulently instructed!'

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[36] As such I gave judgment for the sum claimed RM19,602,119.23 which was the balance amount left unrefunded by Meridian to Zurich together with interest at 5%pa from date of writ to realisation and I also made an order for damages to be assessed as prayed and the same interest to run from date of judgment to realisation.

[37] As for costs I ordered a sum of RM100,000 against Meridian with interest at 5%pa from date of judgment.

The claim of Zurich against AmTrustee for breach of fiduciary duties and negligence

[38] Then I must proceed to consider the more difficult question as to whether Zurich has a claim against AmTrustee for breach of fiduciary duties and negligence.

Claim by Zurich against AmTrustee for breach of fiduciary duties

[39] MAA alleged that AmTrustee had breached its fiduciary duties to MAA in failing to safeguard the interest of MAA, who had entrusted its insurance funds to AmTrustee as custodian, by failing to take any steps to verify the false instructions to transfer.

[40] For one to be a fiduciary of another one must stand in a special relationship of trust and confidence that comes with it a duty to account to that person for the way the duties are being exercised. It is a relationship which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person, who is accordingly vulnerable to abuse by the fiduciary of his or her position. See the case of *Hospital Products Ltd v United State Surgical Corp* (1984) 156 CLR 41; 55 ALR 417.

[41] Learned counsel for AmTrustee, Mr Lim Kian Leong, submitted that it encompasses the idea of faith and confidence and is generally established only when the confidence given by one person is actually accepted by the other person. This causes dependence by the one individual and influence by the other. The fiduciary must knowingly accept that trust and confidence to exercise his expertise and discretion to act on the client's behalf.

[42] Mr Lim continued by highlighting that in order to determine whether

there is any breach of fiduciary duty, particular scrutiny must be placed upon any transaction by which a dominant individual obtains any advantage or profit at the expense of the party under his or her influence. He summarised a fiduciary relationship and its corresponding obligations as having the following three characteristics:

(a) the fiduciary has scope for the exercise of some discretion or power;

(b) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and

(c) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding discretion or power.

[43] It is not denied that here AmTrustee does not have any contractual relationship or for that matter any dealings with MAA. Here the appointment of AmTrustee as a custodian is done by Meridian. A Custodian is required because Parliament in its wisdom has deemed wise and necessary so that fund managers themselves do not have immediate and free access to funds that they manage but that the monies are deposited with a custodian who will act on the fund managers' instruction. Under the Securities Industry Act 1983 ('SIA'), a fund manager is forbidden to have custody of client's money and is required to appoint a custodian of its client account. Monies and especially large amount of it presents a constant temptation to all and even professionals who handle it. Distancing the funds from the fund managers might perhaps provide a protective layer against any perverted use of the funds where speedy and strategic decisions have to be made to outperform industrial average in terms of returns for clients and with that the temptation to cover up one's track where losses have been made.

[44] As pointed out by learned counsel for Meridian, the SIA does not spell out in detail the role of these two players and it is purely a matter of contract between the fund manager and the custodian, hence the CSA. The CSA was signed on 13 August 1998, two years after SIA was amended for the very first time to introduce the requirement on a fund manager to appoint a custodian bank to maintain a trust account for all the monies of the fund manager's clients. There is merit in Mr Lim's submission that at the material time, the concept of investor protection in Malaysia was at its infant stage. When the CSA was signed in 1998, the role of a custodian was relatively more restricted and simpler compared to the role of a custodian today. This is evident from the express legislation which did not impose any direct obligation on a custodian when it comes to managing the fund. On the other hand, the SIA imposed the duty and obligation on the fund manager to ensure that they appoint a custodian to manage their fund failing which it is an offence under the SIA as provided for under s 47C(1) and (9) of the SIA. Section 47C(1) reads:

> The fund manager … *shall* make arrangements for a custodian to maintain such trust accounts.

[45] Eventhough AmTrustee is in actual possession of MAA's funds, AmTrustee does not have any discretion to deal with the funds. Under the custodian agreement that was signed between Meridian and AmTrustee, AmTrustee was just a bare custodian who has to follow Meridian's instructions in respect of the dealing of MAA's funds. AmTrustee's possession of the funds was by virtue of its appointment by Meridian and not by MAA. I note that other than MAA's consent to Meridian's appointment of AmTrustee as custodian, there does not appear to be any other relationship, communication or reporting requirement from the custodian to MAA.

[46] In fact MAA and Zurich cannot even ask or instruct AmTrustee at all. Neither can MAA or Zurich call up AmTrustee to find out the state of its accounts. AmTrustee reports only to Meridian and takes instruction only from Meridian.

[47] As such though AmTrustee would in a sense know who the client of Meridian is whose monies are now parked with them, the above matter taken into consideration and the mere fact of such a knowledge does not make AmTrustee a fiduciary of MAA or Zurich.

[48] It would not be incorrect to say that Meridian is the one that owes a fiduciary duty to MAA. It was its external fund manager and it possessed the relevant investment knowledge and expertise. It was the actual person who would deal with the monies and decide what was in the best interests for MAA as opposed to AmTrustee who was at all material times subject to Meridian's instructions. AmTrustee does not have to do anything until and unless instructed by Meridian. It was Meridian who was charged with the task of wise investment of MAA's funds and the one to pro-actively and promptly made all the strategic moves to in the words of Zurich's witness PW1, 'make tactical allocations fast because the objective is to outperform the benchmark which is set up for them (Meridian)'.

[49] Meridian was the party dominating and having control and sole discretion to deal with MAA's funds. AmTrustee on the other hand cannot deal with MAA's funds without instructions from Meridian. I accept Mr Lim's submission that as a matter of fact, AmTrustee had no knowledge that MAA would rely on the actual report and statements that it sent to Meridian. In fact AmTrustee is not obliged and does not send reports to MAA.

[50] Whilst Meridian is accountable to MAA for the MAA's monies

entrusted for its wise investments, AmTrustee on the other hand is accountable to Meridian and so AmTrustee would report daily and monthly to Meridian on the movements of the funds. Whilst Meridian would instruct AmTrustee, AmTrustee cannot instruct Meridian. Whilst Meridian has to make investment decisions on behalf of MAA and thus be pro-active, AmTrustee makes no decision for MAA and is passive by and large until an instruction comes from Meridian.

[51] I agree with Mr Lim that MAA had not placed 'trust and confidence' in AmTrustee and such a relationship even if MAA sees there is one, it was one where it had not been accepted by AmTrustee. There was no advantage or profit that AmTrustee had obtained at the expense of MAA under the influence of AmTrustee. It has not been shown that AmTrustee had gained an advantage or profit from the fraudulent transactions. All evidence pointed to Ong, a staff of Meridian, who had tried to profit from it to the detriment of Meridian, MAA and AmTrustee.

[52] As was mentioned before, there was another client of Meridian ie KWAP that suffered the same fate and they sued Meridian in the KWAP suit. When PW1 Chen Kim Leong, the Vice President of Zurich, was asked in cross-examination by Mr Lim for Am Bank as to why initially Zurich had not sued Meridian, PW1 said that it was because both MAA then and Meridian were subsidiaries of MAA Holdings Bhd; MAA being wholly-owned by MAA Holdings Bhd. In that KWAP suit, KWAP similarly circumstanced as Zurich, did not sue AmTrustee at all.

[53] It was only after the change of management in MAA to Zurich that the new management decided to bring in Meridian as D2. It is not unreasonable to draw an inference that MAA was aware of the fact that Meridian was responsible for all the losses suffered by MAA but chose not to sue Meridian as MAA and Meridian at that material time were related companies.

[54] I find, for the reasons given above, that AmTrustee did not stand as a fiduciary to MAA/Zurich and does not owe any fiduciary duties to MAA/Zurich, much less to have breached those duties.

Claim of Zurich against AmTrustee for negligence

[55] The other claim by Zurich against AmTrustee is for negligence especially with respect to the false report given to Meridian which Meridian in turn gave to MAA/Zurich.

[56] There is of course no contractual relationship between MAA and AmTrustee. Granted a contractual relationship is not a *sine qua non* for an

action in negligence. But does AmTrustee owe a duty of care to MAA when MAA is not its client and its client is actually Meridian?

[57] Learned counsel for Zurich, Puteri Shenaz Majid, submitted that one must be guided by the principles laid down in the landmark case of *Caparo Industries Plc v Dickman and others* [1990] 2 AC 605 with respect to whether in a particular factual matrix a duty of care may be said to have arisen and with that a cause of action in negligence. It is a three-fold test:

(a) whether the damage suffered by the plaintiff is reasonably foreseeable;

(b) whether there is a relationship of proximity between the plaintiff and the defendant; and

(c) whether it is fair and reasonable that the defendant should owe the plaintiff a duty of care.

[58] As relationships get more complicated especially commercial ones, in determining whether there is a duty of care, one would have to ask not so much the nature of the damage sustained as in whether it is physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind sustained by the plaintiff. Thus the test as first propounded in *Donoghue v Stevenson* [1932] AC 562 in the context of the manufacturer of the ginger beer and its relationship to a consumer of it, has now to be restated in a more intricate commercial relationship as whether the detailed facts and circumstances and the particular relationships between the parties give rise to a duty of care. Such an approach has found favour with the Federal Court in *The Co-Operative Central Bank Ltd v KGV & Associates Sdn Bhd* [2008] 2 MLJ 233; [2008] 2 CLJ 545 and *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; [2006] 2 CLJ 1. A detailed analysis of the relationship between MAA and AmTrustee shall now be undertaken.

[59] PW1 Mr Chen confirmed that MAA did not have any dealings with AmTrustee. He admitted that Meridian is the key party that had dealt with both MAA and AmTrustee. He also confirmed that MAA had no relationship with AmTrustee.

[60] With respect to whether it was right and proper or perhaps negligent for AmTrustee to act on the 28 instructions faxed over to AmTrustee by Meridian which contained a 'cut and paste' signature of Mr Nicholas Ng, that is strictly speaking a matter governed by the CSA between Meridian and AmTrustee. It is relevant in the Meridian Suit.

[61] Here the only connection, if any, and for want of a better word, is very

remote and only confined to holding MAA's monies which monies MAA then and Zurich now cannot instruct AmTrustee on what to do, which state of monies, both MAA then and Zurich now are not in a position to enquire from AmTrustee and which monies AmTrustee does not have a duty to report to MAA or to Zurich but only to Meridian.

[62] It is no doubt true that to some extent AmTrustee as custodian would know the name of the owners of the funds by the name designated to it in its accounts and also from the initial consent of MAA for the appointment of AmTrustee as a custodian. However would mere knowledge of the existence of something automatically give rise to a duty of care? This concept was explored in *ARL Associates Sdn Bhd & Ors v Bank Kerjasama Rakyat Malaysia Bhd* [2012] MLJU 1450 (CA).

[63] In that case, the appellants contended that such duty of care is owed by the respondent to the appellants by reason that:

(a) the first defendant is an 'associate company' of the respondent in that the respondent through its wholly subsidiary companies, indirectly holds 20% shareholding in the first defendant;

(b) the respondent and the first defendant shared common directors, namely Tan Sri Professor Emeritus Dr Syed Jalaluddin bin Syed Salim and Dato' Kamaruzaman bin Che Mat prior to the resignation of the former on 17 March 2008 and the latter on 9 June 2008;

(c) the first defendant's logo bears similarities to the respondent's logo; and

(d) at the first defendant's board meeting on 23 August 2007, the board (in the presence of the two common directors mentioned above) resolved to approve the EDI scheme and because of their presence in such meeting, the respondent knew and consented to all the actions taken by the first defendant vis a vis its marketing of the EDI scheme and the use of the logo.

[64] The alleged cause of action as narrated in the statement of claim as against the respondent was based on the fact that the respondent at all material times had actual knowledge through the common directors that first defendant made the representations.

[65] However the Court of Appeal held that the respondent was not a party to the investment management agreement or any other agreement or documentation which was allegedly executed between the appellants and the first defendant in relation to the EDI scheme. The respondent was also not involved in the marketing of the EDI scheme and had not made any direct representations to the appellants in relation to the EDI scheme which had

allegedly induced the appellants to enter into the investment agreements with the first defendant and to invest in the EDI scheme. The respondent cannot, by reason of its association with the first defendant (being an indirect shareholder of 20% equity in the first defendant) be said to owe a duty of care, in tort to the appellants in respect of obligations of the first defendant, which is a separate legal entity from the respondent.

[66] The evidence of PW1 on behalf of MAA is clear. MAA gave complete discretion to Meridian to invest in which ever investments will yield an optimum return. The report even if given in the current format of reporting which AmTrustee gave to Meridian is not the kind of report that PW1 said MAA had relied on and that had caused the loss that it now claims. As MAA had given complete discretion to Meridian with respect to where to invest, it does not quite matter and indeed the evidence of PW1 viewed as a whole, was that there was no a hint of MAA having relied on the disclosure that some its funds were invested with TA Futures when it was not supposed to be or that it was reflected as with ASD when it was in reality not there. In other words the concern of MAA was on the more than average returns on the investments of its funds by Meridian and nothing whatsoever with AmTrustee's reporting to Meridian even if it was discovered that the report from AmTrustee to Meridian had contained dummy transactions. That would be relevant between Meridian and AmTrustee inter se in as much as it would not be relevant between MAA and AmTrustee.

[67] AmTrustee was also not aware that Meridian at its end would just 'cut and paste' its report to MAA and any report from AmTrustee was given to Meridian for Meridian's consumption only. It would be reasonable for AmTrustee to think and assume that Meridian would look at the investment of MAA as a whole before sending a comprehensive report to MAA. AmTrustee has no control over Meridian with respect to the kind of report that Meridian would send to MAA. The duty of care is owed by Meridian to MAA and correspondingly between Meridian and AmTrustee to each other. It arises both out of the proximity of the relationship between each other as well as the purpose of the relationship.

[68] The issue of payment of AmTrustee's custodian fees which MAA said was paid by them and hence attracts a duty of care, must be viewed in its proper perspective. AmTrustee did not at any time bill MAA. AmTrustee would charge Meridian for its custodial fees as per the transactions and Meridian would in the words of Mr Nicholas Ng, checked if it is right as agreed under the CSA before Meridian charged it to MAA. The fact that the fees is deducted at source from the funds in the accounts of AmTrustee does not convert that into a payment by MAA to AmTrustee. Meridian is entitled to of course pass the costs of the custodial service to its client MAA in as much as AmTrustee is

entitled to charge its client Meridian custodial fees in accordance with the CSA entered into. AmTrustee cannot sue MAA for non-payment of its custodial fees because it had never invoiced it for the fees and all the more because it is not its client, but Meridian is.

[69] Considering the nature of the relationship as spelt out by the SIA and in the CSA between its fund manager Meridian and AmTrustee, I hold that AmTrustee does not owe a duty of care to MAA or to Zurich where its acting on Meridian's instructions and its reporting to Meridian are concerned.

[70] The damage is, in any event, too remote for Zurich now to make such a claim against AmTrustee which claim it would be perfectly entitled to make against Meridian and for which this court had given judgment. AmTrustee was entitled to expect Meridian to have checked through its report and to be satisfied that it was correct before sending it to Zurich. Zurich's concern was not what where the funds are invested but whether it would ultimately yield a return beyond the benchmark set. There was no reliance placed on the report as such by MAA which had resulted in its loss which report no doubt was traceable to AmTrustee report to Meridian. Had Zurich founded its cause of action in negligence against Meridian instead of a breach of trust, Zurich would have succeeded too based on the same factual matrix. Where there is clearly a party liable for a plaintiff's loss in a claim for negligence in a commercial relationship, the court would be slow to find another party liable too where as in this case, there is no contractual relationship between the plaintiff MAA and that other party AmTrustee. All the more when between Meridian and AmTrustee they have bothered to reduce into writing the respective risks involved in relation to acting on instructions and reporting.

[71] The cases referred to by Puteri Shenaz to support Zurich's proposition that AmTrustee owes a duty of care to Zurich can be easily distinguished. *Francis Joseph Putucheary v Eng Securities Sdn Bhd* [2012] 7 MLJ 407 was a case where the remisier had doctored the client's investment report to the client to deceive the client that his account and the CDS account were being properly managed. Here MAA is not AmTrustee's client. Meridian is AmTrustee's client. AmTrustee did not send its reports to MAA, it was Meridian's duty to send. There was no evidence to show that AmTrustee prepared the reports to deceive MAA to believe that MAA's funds was placed with ASD. For all intents and purposes, the reports were prepared for the eyes of Meridian only.

[72] *Malayan Testing Laboratory Sdn Bhd v Standard Chartered Bank Malaysia Bhd* [2010] 9 MLJ 94; [2010] 9 CLJ 309 was a case where the plaintiff had sued its bank for negligence in honouring certain payments by cheques. Here it is a more complicated couplet of relationships — one between MAA and Meridian and another between Meridian and AmTrustee. AmTrustee's

client is not a layman but a licensed fund manager who has the expertise and knowledge to deal with investment. AmTrustee received a fax from Meridian which was perfect on its surface bearing the signature of Nicholas Ng, its managing director. They acted on it not suspecting anything amiss. As to whether AmTrustee was further entitled to a subsequent instruction to record the monies going out to TA Futures as monies going to ASD is something to be explored in the contractual and tortious relationship between the two parties which the parties have spelt out in the CSA entered into between them.

[73] In considering the couplets of relationships one might well want to draw two dotted lines between AmTrustee and MAA direct; one from MAA to AmTrustee where consent to act as custodian is concerned and the other from AmTrustee to MAA where knowledge of the source of funds are concerned but the two dotted lines do not combine to form an unbroken line denoting a duty of care flowing from AmTrustee to MAA.

[74] I do take note that in KWAP's case, KWAP had sued Meridian alone and that the history of this current claim was first of all a claim by MAA then against AmTrustee alone as at that time MAA and Meridian were related companies and it was only upon some restructuring in MAA that Zurich is now no longer related to Meridian and that explains the late joining in of Meridian as a second defendant in this suit.

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[75] Therefore Zurich's claims against AmTrustee for negligence as well as for breach of fiduciary duties were dismissed with costs of RM100,000 and similarly as for interest on costs it shall be at 5%pa from the date of judgment.

The claims by Meridian and AmTrustee against each other

[76] Next I proceed to consider the claims of Meridian and AmTrustee *inter se* one another.

[77] In the Zurich's suit, AmTrustee has a claim for contribution and indemnity against Meridian initially as the third party and later as D2 for an amount which they may have to pay Zurich if they are found liable. In same suit, Meridian as third party also has a claim for contribution and indemnity against AmTrustee in the event that Meridian as D2 is held liable to Zurich. That is captured again in the Meridian suit where the claims by the Meridian as plaintiff against AmTrustee as defendant are the same as between these two parties *inter se* between themselves in the Zurich's suit whether as D1 and D2 against each other or as D1 (AmTrustee) against the third party (Meridian) before D2 (Meridian) was joined in by Zurich as D2. The only difference in the

Meridian suit is that Meridian had included the judgment taken against it by KWAP in the KWAP suit. Complicated as the pleadings are, it is perhaps more a case of parties acting on an over-abundance of caution that can only be productive of prolixity and a protracted trial. Common sense finally prevailed with the parties condescending to focus just on the Zurich's suit which determination would resolve the claims between Meridian and AmTrustee in the Meridian's suit.

[78] It is of course natural when losses have been suffered by a third party for the parties that have been dealing with each other to point an accusing finger at the other and to try as it were to make the other bear all the losses suffered in this case by Zurich.

[79] Under the CSA signed between Meridian and AmTrustee as custodian pursuant to s 47C(1) of the SIA, the duties of AmTrustee are, inter alia, set out below in cl 4 thereof:

> The Custodian hereby covenants and undertakes that it will during the continuance of this Agreement:
>
> (a) *open and maintain a bank account* or bank accounts *in the name of the Custodian* or its nominee(s) for such benefit of the Company with such bank or banks and in such place or places as the Custodian and the Company may from time to time agree,
>
> (b) Keep or *maintain* such *books, records* and *statements of* all cash and Securities held and *all transactions carried out by the Custodian on behalf of the Company* and shall permit the Company and its duly authorised agent(s) or delegate(s) to inspect such books, records and statements at any time on giving reasonable notice to the Custodian. (Emphasis added.)

[80] Clause 13 of the CSA spells out the what AmTrustee may do upon receiving a faxed instruction from Meridian and the consequences of loss arising out of acting on such an instruction:

> The Custodian is hereby irrevocably and unconditionally authorised by the Company to honour and act without any reservation *and without in anyway being obliged to do so:*
>
> On any *instruction request or authority in writing including telex, facsimile or cable purporting to be signed, transmitted or sent by the Company* or any other person(s) on the Company's behalf addressed *to any authorised officer, employee or person acting on behalf of the Custodian* who shall not be liable for so acting on the Company's behalf which the Custodian shall have accepted *in good faith* notwithstanding that it shall subsequently be shown or discovered that the instructions, request or authority was not correct or authentic or duly authorised.

> The *Custodian* is *entitled to assume* that any *instruction received* by the Custodian *is genuine* and shall be under *no duty to make enquiries* to ensure that the *instruction is in fact genuine* and the Custodian *shall not be liable* whatsoever *for the implementation of instructions which the Custodian accepts in good faith* and for *any loss to the Company directly or indirectly resulting from any act* or omission to act *on instructions given or purported to be given.* (Emphasis added.)

[81] I agree that from the very wide wording of the above clause, AmTrustee is entitled to act on any instructions from Meridian whether in writing or verbal and indeed AmTrustee has no duty to verify signatures of Meridian's instructions. Further AmTrustee has no duty to ensure that transfers or payments are only made to the respective clients' names as payee. AmTrustee is obliged to act on instructions of Meridian irrespective of whether those instructions were to make transfers or payments to Meridian's clients or other third parties. Likewise AmTrustee has no duty to make any inquiry as to the purpose and nature of the transfers or payment to TA Futures. It can be accepted that AmTrustee has no duty to confirm or check with Meridian whether the instructions to transfer monies or make payment to TA Futures were bona fide.

[82] Meridian must have been aware that when it authorised AmTrustee to accept even faxed instructions, it takes the risk that there may well be unauthorised transactions which AmTrustee has accepted in good faith like the faxed instructions to place MAA's funds with TA Futures. As pointed out in the evidence of Mr Nicholas Ng, there had been previous instructions where he had not signed on the faxed instructions in writing but they were nevertheless genuine instructions. It must be appreciated that the nature of the transactions are such that decisions have to be made quickly and AmTrustee as the custodian can be delaying the effecting of the instructions. Hence the approved mode of instructions by fax and even a clarifying follow-up instructions orally. However when the follow-up instructions is contradictory and has the effect of cancelling the first instruction and even camouflaging it, then AmTrustee must not be a compliant automaton doing the bidding of Meridian.

[83] The court takes a simple approach by asking where is the source of the temptation. The source was from Meridian in the person of Ong. Ong was the tempter who sought as the source of the temptation to ensnare its target victim in the staff of AmTrustee. It was a scheme designed to deceive and devour any persons that might succumb to it.

[84] He found the persons in the staff of AmTrustee. His instructions were nevertheless in writing: one for payments to TA Futures and at the same time another written faxed instruction by way of fixed deposit slips (dealing slips) to

place the same amounts with ASD. He then called up to clarify what he meant which is to pay TA Futures but to record as placement to ASD.

[85] The staff of AmTrustee thought something was not quite right but having gotten clearance from their superiors, they followed the instructions and so the daily and monthly reports reflected the said placements. Ong had justified the instructions as saying that TA Futures and ASD were related companies. Was it a case where the staff were swooned by Ong's profoundly simple but sly explanation or perhaps just sucking in hook, line and sinker what was a most silly thing to do?

[86] AmTrustee of course ought not to have done that as they should have smelt something rotten is about to take place. More than that in the subsequent reports to Meridian and this went on for some 30 transactions spanning over three years, it even carries the element of interest supposedly earned from the various placements of the monies with ASD. What is most damning is that AmTrustee have not been able to explain how that had come about though it is clear that the report had emanated from them!

[87] At Meridian's end, Mr Nicholas confessed that had he checked the daily report coming in from AmTrustee with the report from ASD, he would have discovered the fraud perpetrated by Ong. The evidence as admitted by him was that he did not check. He admitted that had he checked the very first transaction, he would have discovered it. He also admitted that ASD would have sent Meridian the details as to the placements of deposits with them and if the deposits were not there, it would have been discovered. That non-discovery continued until a fine day AmTrustee discovered something was amiss and alerted Meridian. It was then that Ong was suspended and his authority terminated and the fraud uncovered! How true it is that still waters run deep and that beneath the veneer of calm serenity is the venomous craftiness of a suave schemer.

[88] Where the fraud could not have been carried without the action or inaction of the parties entrusted to exercise due care and diligence to each other, neither can put the full blame on the other but each must own up to the extent of its culpability and liability. Even at the very beginning, such finger pointing was no stranger to Adam and Eve. When confronted on what had catastrophically gone wrong, Adam said 'The woman you gave me, she gave me the fruit and I ate it'. Eve in turn blamed the serpent: 'The serpent (you put in the garden) deceived me and I took of the fruit'. The serpent of course had no more legs to stand on! The finger pointing must stop and just as Adam and Eve woke up to face the consequences, so too must Meridian and AmTrustee. Things do not just simply happen; there is always the human agency of actions or inactions in operation.

[89] Looking at Meridian, Ong being the source of the temptation, was the genesis of it all. Meridian had no proper supervision of Ong and indeed allowed him a free rein with what he did and the reports he received. Even its own internal auditors did not discover it. Mr Nicholas himself also did not exercise due diligence in ensuring that the reports of AmTrustee were a correct reflection of the placement of funds.

[90] AmTrustee on the other hand cannot see their role as a passive automaton or robot receiving instruction and acting on it in obedience and obeisance without even raising an eye brow when they knew or ought to have known that something was amiss. They cannot explain away the dummy transactions especially the reflection of interest earned in ASD when there was no placements of funds. Indeed cl 11 of the CSA is a 'Refusal to Act' clause that reads:

> The Custodian shall act in accordance with the instructions of the Company *to the extent permitted by law* and shall be entitled (subject to notice having been given to the Company) to *refuse to act on any instruction by the Company* if in the opinion of the Custodian any liability (whether present, future or contingent) may be incurred by the Custodian to any person pursuant to its performance of duties hereunder.
>
> The Custodian *shall not incur liability by refusing to act in good faith* to perform any function or obligation herein which in its judgment is improper or unauthorized provided that in performing its functions and obligations pursuant to this Agreement *it shall not be required at any time to do or procure the doing of anything contrary to or in breach of or which constitute any offence against any applicable law or regulation in force.* (Emphasis added.)

[91] Clause 11 is clear in that AmTrustee is not obliged and need not obey orders of Meridian to do anything that would cause it to breach any applicable law. As can be seen below in cl 18 under 'Indemnity' there are situations where due to the negligence of willful default of AmTrustee, it may be liable to Meridian. Clause 18 reads:

> Clause 18 Indemnity
>
> (a) …
>
> (b) *In the absence of negligence or willful default on the part of the Custodian, its directors or officers*, the Custodian *shall not be liable to the Company for any loss or damage suffered arising directly or indirectly out of such error and judgment on the part of the Custodian* or any such person as aforesaid, made or *committed in good faith* in the course of or *in connection with performance of the duties* of the Custodian hereunder, and *in the absence of negligence or willful default*, the Custodian shall not be responsible for any loss or damage which the Company may sustain or suffer as the result of, or in the course of, the discharge of its duties and *the Company shall indemnify and hold harmless the Custodian* against all claims and demands (including costs and

> expenses arising therefrom and incidental thereto) which may be made against the Custodian *in respect of any loss or damage sustained or suffered by any third party otherwise than by reason of negligence or willful default* on the part of the Custodian or any such person as aforesaid. (Emphasis added.)

[92] It is clear from the above that there are circumstances where AmTrustee would owe a duty of care to Meridian and that it will only not be liable to Meridian if it is not found to be guilty of negligent or of willful default. AmTrustee is required to make a judgment in some instances and one such instance would be one when knowing that the funds had left for TA Futures, it is reflected as having been placed with ASD. More than that interests were also reflected in its reports to Meridian when it could not have been so earned as the funds were not placed there. If it had applied its mind to the follow-up instruction, which it is expected to, it would have discerned in its judgment call that something is amiss.

[93] Mr Loh for Meridian submitted that trust is necessary for the wheels of commerce to turn smoothly and that delegation is necessary lest one be crushed under the weight of one's responsibilities. He cited *Dovey and The Metropolitan Bank (of England And Wales), Limited v John Cory* [1901] AC 477 (HL), where Halsbury LC said:

> The charge of neglect appears to rest on the assertion that Mr Cory, like the other directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon the distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible. Was Mr Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairman were all alike deceiving him? That the letters of the auditors were kept from him to clear. That he was assured that provision had been made for bad debts, and that he believed such assurance, is involved in the admission that he was guilty of no moral fraud; so that it comes to this, that he ought to have discovered a network of conspiracy and fraud by which he was surrounded, and found out that his own brother and the managing directors (who have since been made criminally responsible for frauds connected with their respective offices) were including him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculation of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr Cory was deceived by his own officers — and the theory of his being free from moral fraud assumes under the circumstances that he was — there appears to me to be no case against him at all. The provision

made for bad debts, it is well said, was inadequate; but those who assured him that it was adequate were the very persons who were to attend to that part of the business; and so of the rest. If the state and condition of the bank were what was represented then no one will say that the sum paid in dividends was excessive.

[94] Mr Loh also cited an old English case of *In Re City Equitable Fire Insurance Company Ltd* [1925] Ch 407, where Romer J said:

> A director must of necessity trust to the officials of the company to perform properly and honestly the duties allocated to those officials. In many large companies — it was so in the case of the City Equitable — it is the duty of the manager to pay the salaries and wages of the staff. For that purpose cheques are drawn by the directors in his favour, the exact amount required being calculated by him. So long as there is nothing suspicious about the amount, the directors are justified in trusting him to calculate the correctly, and to use the proceeds of the cheque for the purpose of which it was drawn. The fact, therefore, that a respondent director signed cheques in favour of Mansell for or on account of commission does not necessarily make him responsible to the company for any payments so made to Mansell in excess of what was really due to him. In order to determine whether any respondent director can be made so liable, I must consider the circumstances in which he signed the cheques in question for the purpose of seeing whether there was anything that should have put him on inquiry, either by reason of the amounts of which the cheques were drawn, or of any irregularity in the method in which they were presented to him for payment.

[95] I have no problem with the approach taken in the two cases above spoken in the context of a director being sued. It can be accepted that in the absence of reasons to suspect, the emplacement of trust in employees by employers is a pre-requisite for the efficient functioning of businesses. Internally within a company one can have various management approaches such as delegation, empowerment, chain of command and the duty to report and account for. Externally, however as they say the buck stops here where the company is sought to be made liable. The need to delegate does not derogate from the fact that final responsibility rest with the company where its actions or inaction have caused harm and injury to a third party.

[96] I am glad that learned counsel was not suggesting absolute or total abandonment of prudence or caution or duty: *Barings plc & Ors (No 5), Re, Secretary of State for Trade and Industry v Baker (No 5)* [2000] 1 BCLC 523 and affirmed on appeal [2000] 1 BCLC 523.

[97] I agree that in the context of legal entities, the company is the principal and its directors are its agents. The primary rules of attribution are found in its articles of association: *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] AC 500, at p 506. There are also general rules of attribution

and the general rules of attribution lies in agency law to facilitate everyday businesses or activities: *Meridian Global Funds Management Asia Ltd* at p 506. In fact such a submission of Meridian further underscores the fact that the principal cannot escape the actions of its agents where its dealings with third parties are concerned.

[98] Some arguments have been made on the fact that AmTrustee's fees is some ten times less than that charged by Meridian and as such this factor should bear upon the court when apportioning liability. Meridian's argument is that they were paid higher fees for the investments skills that yields a return for their clients. All said the relative fees that parties charged may be reflected in the need to apportion liability even as the parties have sought to limit liability under certain circumstances. In *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd and another et e contra* [1983] 1 All ER 101 (HL), Lord Wilberforce observed as follows:

> Whether a condition limiting liability is effective or not is a question of construction of that condition in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly and unambiguously expressed, and, in such a contract as this, must be construed contra proferentem. I do not think that there is any doubt so far. But I venture to add one further qualification, or at least clarification: one must not strive to create ambiguities by strained construction, as I think the appellants have striven to do. The relevant words must be given, if possible, their natural, plain meaning. *Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion; this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives and possibly also the opportunity of the other party to insure.* (Emphasis added.)

[99] The court would note the fact that there is at any rate a base fee of 0.25% charged by Meridian to MAA compared to 0.02% that charged by AmTrustee acting as custodian.

[100] It is clear without the need to split hairs that both owe a duty of care to each other. Meridian in giving clear, unambiguous instructions in writing to AmTrustee and it goes without saying not to entice any staff of AmTrustee to fall for any egregious plans that Ong or any staff may have up their sleeve. AmTrustee of course has to alert Meridian if there is any such attempt and indeed in the custodian agreement to even refuse to act on such instructions. They also have to record correctly their daily report to Meridian.

[101] Looking at the respective culpabilities of Meridian vis a vis AmTrustee, I am of the view that the source of the temptation as in the tempter and who he represented ie Meridian should take the greater blame. Without him, this loss would not have happened.

[102] AmTrustee on the other hand cannot say that it was all right to have succumbed to the temptation presented by Ong. They have a duty as custodian to ensure that they act only upon proper instructions and not on one that clearly stinks. It does not take much intelligence to know that one cannot act on both instructions validly. When the funds in question in the transactions had gone out to TA Futures, how could it be recorded as having been placed in ASD and more than that, to be earning interests with the passage of time?! This is a fit case for apportioning liability as was done in *Mayban Trustee Berhad v CIMB Bank Berhad and other appeals* [2012] 6 MLJ 354.

PRONOUNCEMENT

[103] Taking into consideration the overall facts including risk management or the lack of it in the respective parties, the source of the wrong doing, the succumbing to it and the fact that at certain points it could have been prevented and to some extent the fee structure for the services provided, I had ordered that the liability shall be 60% on the part of Meridian and 40% on the part of AmTrustee.

[104] Therefore AmTrustee shall be liable for 40% of the claim for contribution or indemnity from Meridian with respect to the amount that Meridian has been found liable to KWAP and Zurich.

[105] Parties agreed that costs should be RM20,000 to be paid by Meridian to AmTrustee

POSTSCRIPT

[106] Barings Bank, the oldest merchant bank in London, collapsed in 1995, because of the fraud of one single employee, Nick Leeson. Arthur Andersen, one of the five largest audit and accounting firms collapsed in 2002, because of one single client Enron after the uncovering of financial and accounting fraud. One single employee Ong must have shaken Meridian to the core with his 30 fraudulent transactions of RM41,248,000 and after his returning certain sums, Meridian still owes about RM27,606,169.65 to its two clients Zurich and KWAP.

[107] It sounds almost cliche to say that such a calamity will happen again though with hindsight we are all supposed to have gained some insight into the vulnerabilities of being human. No system can be better than the people that man it. The human ingredient and interface is critical and no risk management system can replace it. While everyone is deemed trustworthy until proven otherwise, yet in the process everything and everyone must be tested and tried to see if it can stand the scrutiny and searchlight of truth. It was tried and found

wanting but alas only after some 30 transactions spreading over about three years. It was rather late but better late than never though better never late.

Claim allowed with costs.

Reported by Ashok Kumar